

May 4, 2010

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Tarek Farag

Date of Filing: April 15, 2010

Case Number: TFA-0365

On April 15, 2010, Tarek Farag (Appellant) filed an Appeal from a determination issued to him on March 24, 2010, by the Office of Classification (Classification) of the Department of Energy (DOE). In that determination, Classification responded to a request for information the Appellant filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy in 10 C.F.R. Part 1004. In its determination, Classification identified and released documents responsive to the Appellant's request. The Appellant challenged the adequacy of Classification's search for documents. This appeal, if granted, would require Classification to conduct a further search for responsive documents.

I. Background

On December 2, 2009, the Appellant requested "the information and the reasons upon which the two reviewers from the DOE decided that secrecy is not recommended" in regard to his patent application regarding a method and a process for isotope separation. Request Letter dated December 2, 2009, from Appellant to DOE. On December 9, 2009, the DOE FOIA office sent the request to Classification. On March 24, 2010, Classification released numerous documents responsive to the Appellant's request. Determination Letter dated March 24, 2010, from Andrew P. Weston-Dawkes, Director, Classification, Office of Health, Safety and Security (Determination Letter).

On April 15, 2010, the Appellant appealed the Determination because he did not receive a written explanation regarding the "secrecy not recommended" decision. In his Appeal, he claimed that "two reviewers . . . offered many times to give a **written explanation of the [secrecy not recommended] decision.**" Appeal Letter dated April 8, 2010, from Appellant

to Director, Office of Hearings and Appeals (OHA) (Appeal Letter). Also in his Appeal, he asked for the qualifications of the reviewers, including general experience; specialized experience in the nuclear field; and specialized experience in isotope separation techniques, as well as their education. *Id.*

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must “conduct a search reasonably calculated to uncover all relevant documents.” *Truitt v. Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). “The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials.” *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Glen Bowers*, Case No. TFA-0138 (2006); *Doris M. Harthun*, Case No. TFA-0015 (2003).^{1/}

We contacted Classification to determine what type of search was conducted. In response, Classification indicated that an e-mail had been sent to each of the offices within Classification stating that a FOIA request had been received and asking if each office had any responsive information. Everything that was found to be responsive to the Appellant’s request was released to him.

The Appellant challenged the Determination claiming that the two reviewers offered a written explanation of the recommendation. Classification indicated that if the written explanation existed, it would have been produced with the responsive documents released to the Appellant. Furthermore, a person knowledgeable about this matter indicated that no written explanation was ever produced, as evidenced by two e-mails released to the Appellant. In an e-mail to the Patent Office, Classification offered to create a written explanation of why Classification determined that “secrecy was not recommended.” E-mail dated April 26, 2010, from Fletcher Whitworth, Classification, to Janet R. H. Fishman, OHA, Attachment at 34. In a return e-mail, the Patent Office indicated that the e-mail explanation from Classification was sufficient and no written explanation was needed. *Id.* at 35. We believe the search that Classification conducted was reasonably calculated to reveal the records responsive to the Appellant’s request, including the written explanation if one existed.

^{1/} All OHA FOIA decisions issued after November 19, 1996, may be accessed at <http://www.oha.doe.gov/foia1.asp>.

The FOIA does not require an agency to create documents in response to a request. 5 U.S.C. § 552; 10 C.F.R. § 1004.4(d)(1), (2); *Terry M. Apodaca*, Case No. TFA-0319 (July 7, 2009); *David B. McCoy*, Case No. VFA-0707 (January 16, 2002); *Barbara Schwarz*, Case No. VFA-0701 (November 5, 2001). Classification stated that no written explanation exists. Classification cannot be required to produce a document that does not exist.

Also in his Appeal, the Appellant asked for the reviewers' qualifications and education. We note that he did not ask for this information in his initial request. We do not permit requesters to expand the scope of their request on appeal. *Cliff Jenkins*, Case No. TFA-0122 (November 7, 2005); *F.A.C.T.S.*, 26 DOE ¶ 80,132 at 80, 578 (1996); *Alan J. White*, 17 DOE ¶ 80,117, at 80,539 (1988); *see also Arthur Scanla*, 13 DOE ¶ 80,133 at 80,622 n.2 (1986). If the Appellant wishes to request this additional information, he must file a new FOIA request seeking those documents.

III. Conclusion

The search that Classification conducted was reasonably calculated to reveal records responsive to the Appellant's request, including the written explanation. In regard to the other information the Appellant requested in his Appeal, this is a broadening of his original request. He must file a new request seeking that information. Accordingly, this Appeal will be denied.

It Is Therefore Ordered That:

- (1) The Appeal filed by Tarek Farag, Case No. TFA-0365, is hereby denied.
- (2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review. Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: May 4, 2010